IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12737/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 18 August 2015	**On 4 December 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER – ISLAMABAD

Appellant

and

KHURRAM AZAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Ms Javed, Reiss Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant was born on 26 June 1984 and is a male citizen of Pakistan. The appellant applied for entry clearance to the United Kingdom as a partner under Appendix FM of HC 395. His application was refused by the Entry Clearance Officer (ECO) Islamabad on 11 September 2014. The appellant appealed to the First-tier Tribunal (Judge Hillis) which, in a decision promulgated 27 April 2015 allowed the appeal under Article 8

ECHR. The Entry Clearance Officer now appeals, with permission, to the Upper Tribunal.

2. The parties agree that the appellant was unable to meet the requirements of the Immigration Rules as regards income. The appellant and his wife (the sponsor) were required to have an income of £18,600 per annum. It appears that the wife now has an income in excess of that sum but was not able to prove this, in accordance with the Immigration Rules, at the date of the application and decision. The judge noted at [20] that the wife's new gross annual income of £18,720 was referred to in a contract with her employer dated 5 April 2014. Her salary began to be paid on 1 April 2014. That date was after the date of the application made by the appellant. Notwithstanding that fact, the judge found [21] that the respondent had evidence in her possession at the date of decision which, "on the face of it" indicated the appellant's sponsor met the minimum income requirement of £18,600. The judge found that there had been "a not insignificant delay" in the ECO reaching a decision which had been delayed pending the judgment of the Court of Appeal in *MM [2014] EWCA Civ 985.* Unaccountably, the judge went on to find that "this delay, in practical terms, prohibited the appellant from making a fresh application in June 2014 when his sponsor would be able to submit the relevant six month period of documentation to meet the Rules". As the grounds point out, there was nothing to prevent the applicant withdrawing her existing application when making a new one based upon the sponsor's new, increased income.

3. In addition, the judge's reasoning for his decision to allow the appeal on Article 8 grounds is not, in my opinion, sound. At [22] the judge noted that a further application for entry clearance would "lead to a further delay and considerable expense". The judge took the view that the respondent could have indicated that the delay in waiting for the decision in *MM* "was an interference with the appellant's Article 8 rights and could easily be rectified by some basic and non-costly enquiries to check the new employment details were genuine". Again, I am not entirely certain what the judge means by this statement. The judge appears to believe that the ECO should, contrary to the procedures which he or she is obliged to follow, have granted entry clearance to the appellant notwithstanding the fact that he was unable to meet the requirements of the Immigration Rules. The ECO's failure to follow such a course of action appears to have led the judge to consider that the decision was disproportionate in the Article 8 analysis. Indeed, the judge went on [23] to find that it was disproportionate to expect the appellant "to submit the same documentation of his sponsor's income which she knows, on the face of it, meets the Immigration Rules …" The judge also makes passing reference to Section 117B of the 2002 Act (as amended) at [24] but does not indicate how he has taken that Section into account and makes an assertion in the same paragraph that "it cannot be said … that the respondent's decision was made to protect the economic wellbeing of the UK economy or the maintenance of immigration control". If the decision was not made for any of those reasons, the judge does not indicate on what basis he considers the decision was made.

4. Throughout the decision, the reasoning of the judge is difficult to follow and, at times, confused. As Designated Judge Lewis stated in granting permission to the respondent, the considerations under Article 8 which I have outlined above

> "... would arguably have been irrelevant or marginal at best. Since the appellant was not able to meet the requirements of the Immigration Rules, the judge did not articulate why he considered an Article 8 proportionality assessment as appropriate."

Indeed, the judge has made no effort to show why the circumstances in this appeal were so exceptional that the appeal should be allowed under Article 8. This is a case in which the judge has (for understandable reasons) felt sympathy for the appellant and sponsor and has simply used Article 8 to provide them relief where the appellant could not succeed under the Immigration Rules. That is not, in my opinion, a legitimate use of Article 8. I agree with the ECO that it was open to the appellant to withdraw his application when it became apparent that he would not succeed under the Immigration Rules but when his wife had increased her income and when that a fresh application (supported by the necessary documentation) stood a good chance of exceeding. The appellant chose not to follow that course of action. Thereafter, it was not for Judge Hillis to put matters right for the appellant. In the circumstances, I set aside Judge Hillis's decision and have remade the decision. The appeal against the immigration decision is dismissed under the Immigration Rules and on human rights (Article 8 ECHR) grounds.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 27 April 2015 is set aside. I have remade the decision. The appeal of the appellant against the decision of the Entry Clearance Officer dated 11 September 2014 is dismissed under the Immigration Rules and on human rights grounds (Article 8 ECHR).

No anonymity direction is made.

Signed Date 10 November 2015

Upper Tribunal Judge Clive Lane